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Harry P. Susman

February 11, 2011

VIA EMAIL

The Honorable Anthony J. Carpinello
JAMS
620 Eighth Avenue, 34th Floor
New York, NY 10018

Re: **FORTRESS VERF I LLC and FORTRESS VALUE RECOVERY vs. JEEPERS, INC.**
JAMS Ref. No.: 1425006537

Dear Judge Carpinello:

Financial Trust Company, Inc. and Jeepers, Inc. (collectively "FTC") submit this letter requesting permission to take the deposition of Perry Gruss.

As Your Honor is aware, this dispute centers on FTC's effort to withdraw its investment in a hedge fund run by Daniel Zwirn, called D.B. Zwirn Special Opportunities Fund, L.P. ("Fund"). As the former Chief Financial Officer of Zwirn's management company, Gruss is a critical witness to this dispute.

In October 2006, Zwirn informed FTC that Gruss had been fired for permitting certain improper financial transactions to occur, and subsequently, that additional improprieties had surfaced after Gruss's termination. In response, FTC demanded a withdrawal of its entire capital account investment in the Fund, which was worth an estimated \$130 million at the time. After numerous discussions, on November 13, 2006, Zwirn and the Fund persuaded FTC to agree to reduce FTC's its withdrawal to \$80 million. In March 2007, the Fund reneged in writing on its agreement to honor FTC's reduced the \$80 million withdrawal in writing, claiming for the first time that under a Letter Agreement between the Fund and FTC dated January 1, 2005 ("Letter Agreement"), FTC only had a right to make demand—a complete withdrawal of its capital

account, and had no right to make the partial withdrawal of \$80 million. In other words, the Fund now claimed that had FTC not reduced its withdrawal request from a complete withdrawal for demanded the entire \$130 million to the \$80 million dollar withdrawal (to which the Fund persuaded FTC to agree), that it originally sought rather than the \$80 million, the Fund presumably would have had to honored FTC's complete withdrawal the demand.

As a result, a key issue in this case will be why FTC reduced its request from a complete withdrawal of \$130 million to a partial withdrawal of \$80 million. FTC claims that it was fraudulently induced to agree to a reduced withdrawal in part based on Zwirn's assurance that the misconduct at the Fund was confined to Gruss, an allegedly rogue employee, and that Zwirn had nothing to do with it. Obviously, if FTC knew that Zwirn was lying about the issues plaguing the Fund (and Gruss contends to this day that Zwirn was lying), FTC would not have backed down from its complete withdrawal request, and the Fund would not now be claiming that FTC's request for a partial withdrawal was invalid. ~~have its argument to reject FTC's partial withdrawal request.~~

Even if Zwirn did not participate in Gruss's misconduct but merely discovered it after-the-fact (as Zwirn contends), the timing of when Zwirn uncovered these issues is critical. Putting aside FTC's rights under the Letter Agreement, the Fund claims that FTC had the right to withdraw each of the five capital contributions it made over a period years on the two-year anniversary of each contribution. The Fund now claims that as of 2006, FTC could have withdrawn its capital account in a series of withdrawals made on the following dates:

- June 30, 2006
- September 30, 2006
- December 31, 2006
- March 31, 2007
- June 30, 2007

As a result, when Zwirn revealed the Gruss issue to FTC in October 2006, it was too late (under the Fund's interpretation) for FTC to withdraw its capital account with respect to the capital contributions whose two-year anniversaries fell on June 30, September 30, and December 31, 2006 (there was a 120-day notice requirement, so even ~~the~~ December 31 window had already closed as of October 2006). FTC's capital account with respect to the ~~These~~ capital contributions ~~was~~ are worth roughly \$80 million at the time. The Fund claimed that the windows to withdraw from FTC's capital account with respect to these contributions would not re-open until 2008, at which point no withdrawals were honored due to intervening events. In other words, had FTC demanded its money back earlier in 2006, it would have perfected its right to receive payment of its entire capital account even under the Fund's interpretation of FTC's rights. ~~(Notably~~ Conspicuously, even under the Fund's interpretation of FTC's withdrawal rights, FTC had the right to withdraw \$45 million from its capital account based on two capital contributions whose two-year anniversaries fell on ~~worth \$45 million~~ on March 31, 2007 and June 30, 2007, and as noted above, FTC made a timely demand to withdraw \$80 million on November 13, 2006. Yet, even as of today, the Fund refuses to honor FTC's request to withdraw at least the \$45 million, without ever having provided any legitimate explanation for ~~although the Fund has never explained the basis for~~ its refusal.)

FTC alleges that Zwirn "discovered" the Gruss misconduct early in 2006 but waited until October 2006 to inform investors. FTC believes that Gruss will testify that Zwirn confronted him about these issues in the early Spring of 2006. Had Zwirn revealed to FTC the misconduct in early 2006, FTC would have made valid withdrawal demands for the vast majority of its investment even accepting the Fund's view of FTC's withdrawal rights. FTC anticipates that

Zwirn will excuse his delay by claiming he was “investigating” the facts. FTC believes that Gruss’s testimony will establish that any investigation was a sham to buy time; Zwirn knew all the facts because either Zwirn participated in the improprieties directly or Gruss readily confessed when first confronted because he had nothing to hide.

Zwirn and the Fund expressed the concern that by deposing Gruss, FTC will introduce issues that cannot be resolved during the allotted hearing dates. This objection deserves little consideration. All of the above issues were spelled out in FTC’s Counter- and Third-Party Claim. As a result, Zwirn and the Fund were well aware that these issues were in the case when they agreed to the current hearing schedule. Moreover, FTC can call Gruss at the hearing, but without a deposition, his testimony will take more hearing time, not less. Zwirn’s real objective is clear. Zwirn has produced to FTC over 15 million pages of documents that Zwirn produced to the SEC and presumably relate to Gruss’s alleged misconduct. If Zwirn can prevent a deposition of Gruss, who can point FTC to the critical issues, Zwirn hopes to bury his own misconduct in a mountain of discovery material. This tactic should not be condoned.

For the forgoing reasons, FTC respectfully requests that Your Honor authorize a deposition of Perry Gruss.

Sincerely,

Stephen D. Susman

cc: William O’Brien (counsel for D.B. Zwirn Partners, LLC, D.B. Zwirn & Co., L.P., DBZ GP, LLC, and Zwirn Holdings, LLC)
Allan Arffa (counsel for Fortress VRF I LLC and Fortress Value Recovery Fund I LLC)
John Siffert (counsel for Daniel Zwirn)